No. 10909

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HAROLD C. STROTZ,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

BRIEF OF APPELLEE.

FRANK MICHELS,
134 South La Salle Street,
Chicago 3, Illinois,
JACOB J. LIEBERMAN,
1009 Commercial Exchange Bldg.,
416 West Eighth Street,
Los Angeles 14, California,
Attorneys for Reconstruction Finance Corporation, Appellee.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

TOPICAL INDEX.

Table of Authorities Cited.

Cases.

Statutes.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HAROLD C. STROTZ, *Appellant,* *vs.* RECONSTRUCTION FINANCE CORPORATION, *Appellee.*	

BRIEF OF APPELLEE.

STATEMENT.

Harold C. Strotz, the bankrupt, was formerly a resident of Chicago, Illinois. About five years prior to the filing of his bankruptcy petition he moved to California. He was the son of Charles Nicolas Strotz who died at Chicago, Illinois, in 1928 (Tr. 29), who left a will creating a trust of which The First National Bank of Chicago and the bankrupt are trustees, the corpus of which is held by The First National Bank of Chicago as such trustee in the State of Illinois. The assets of the trust exceed one million dollars. The bankrupt's mother receives the income dur-

ing her life. The annual net income of the trust exceeds $30,000. Under the provisions of the trust it terminates upon the death of his mother and the bankrupt then is to receive one-third of the principal thereof. Paragraph XXII contains a "spendthrift clause" under the terms of which the interest of the bankrupt is expressly declared to be not a vested interest and not subject to the right to anticipate, assign or encumber the same nor subject to the claims of creditors of the bankrupt. Under the laws of Illinois where said trust exists, said provision is valid and certain purported assignments by the bankrupt of said interest, hereinafter referred to, are void (Tr. 42, 137, 212).

Harold C. Strotz filed his voluntary petition in bankruptcy in this cause October 22, 1940 (Tr. 2). The original schedule listed claims of unsecured creditors aggregating $477,854.14 (Tr. 20). The claim of the RFC was not listed in the original schedule. Two secured claims were listed: one of Pauline D. Rudolph in the amount of $802,411.77 (Tr. 9), and Continental Illinois Bank of Chicago in the amount of $30,999.93 (Tr. 12). The security held by these creditors was a purported transfer by the bankrupt of his interest in the residuary trust estate created by the will of Charles Nicholas Strotz. In listing these claims the bankrupt set forth the provisions of the trust pertaining to the prohibition against assignment, etc. (Tr. 10). The sole assets listed in the schedule are household goods of $100, claimed as exempt, and an automobile valued at $525 (Tr. 24, 25). An order of adjudication was entered October 23, 1940, and the matter referred to Ernest R. Utley, one of the Referees in Bankruptcy (Tr. 33).

On January 6, 1941, the bankrupt filed an amended schedule listing the claim of the RFC (Tr. 34). The total amount of unsecured claims filed was $974,848.64. One

claim in the amount of $245,811.25 was disallowed, reducing the amount of the claims to $729,037.39 (Tr. 118). Included in this amount was the claim of the RFC in the sum of $340,566.45 (Tr. 170). The RFC contested another claim of Eugenia Vollintine, a divorced wife of the bankrupt, for $168,410.85 on the ground that it was barred by the Statute of Limitations (Tr. 170). This claim was allowed by the District Judge in the order appealed from.

On March 19, 1941, the RFC filed its specifications of objections to the discharge of the bankrupt (Tr. 63), wherein it was charged (a) that the bankrupt failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained, and (b) that the bankrupt at a time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy concealed his property with intent to hinder, delay or defraud his creditors.

After the objections to his discharge were filed, the bankrupt on April 30, 1941, filed a petition for arrangement under Chapter XI, sec. 321 (Tr. 37), wherein he proposed (Tr. 42) to pay to his trustee in bankruptcy for the benefit of his creditors the sum of $10,000 cash and in addition execute any necessary writing by the terms of which he would assign to his creditors ten per cent of the right, title or interest which he may have as a beneficiary under the trust created by his father's estate, calling attention to the provisions of the "spendthrift clause" pertaining to the prohibition against assignment. Objections were filed to this plan by the RFC and other creditors; whereupon the bankrupt filed an amended petition for arrangement (Tr. 44) increasing the amount of cash to be paid to the trustee from $10,000 to $25,000 (Tr. 49). Objections were filed to the amended plan by the RFC and other creditors. On May 27, 1942, the bankrupt filed a second

amendment to his petition for arrangement (Tr. 51) increasing the amount of cash to be paid to his trustee from $25,000 to $32,000 (Tr. 53). This amendment stated that creditors whose claims aggregated $324,341.37 had accepted the plan; that the RFC upon its claim of $340,566.44 and the Continental Illinois Bank of Chicago upon its claim of $32,055.70 had not accepted the plan (Tr. 52).

The matter came on to be heard before Referee Utley upon the objections filed by the RFC and other creditors (Tr. 68) to the discharge and amended petition for arrangement (Tr. 70). By stipulation of the parties the matter was submitted to Referee Utley upon the examination previously had before him under Section 21a of the Bankruptcy Act and upon the trustee's petition against one F. J. Ward to set aside various transfers (Tr. 114).

The specifications of the bankrupt's discharge filed by the RFC and relied upon in the District Court were as follows:

1. That the bankrupt subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy transferred and concealed his property with intent to hinder, delay or defraud his creditors by the following:

(a) During said period he maintained a bank account in the name of F. J. Ward at the Security-First National Bank, Los Angeles, California, with intent to hinder, defraud and delay his creditors (Tr. 64).

(b) That the bankrupt, for the purpose of hindering, delaying and defrauding his creditors, caused to be concealed the sum of $11,500 which he withdrew from the bank account of the estate of Anne Gould Strotz, a deceased wife, and that as executor of the estate he failed to file an inventory or appraisement in the estate of said decedent pending in the Superior Court of Los Angeles County, for the purpose of con-

cealing from his creditors the fact that there were assets in said estate and the fact that his interest in said estate was of some value (Tr. 66).

2. That the bankrupt destroyed, mutilated, concealed and failed to keep or preserve books of account or records from which the financial condition and business transactions of the bankrupt might be ascertained (Tr. 63).

The Ward Bank Account.

The bankrupt upon his examination before the Referee admitted that from December 13, 1938, to August 30, 1940, he maintained a bank account in the name of F. J. Ward at the Security-First National Bank at Los Angeles, California. The record contains a signature card dated December 7, 1938, at the Security Bank whereby Ward gave power of attorney to the bankrupt to sign checks, etc., on the account maintained in the name of Ward (Tr. 195). The record also contains the bank record showing deposits and withdrawals made by the bankrupt from this account from December 13, 1938, to August 30, 1940 (Tr. 196-203). This record shows that during said period he made 66 deposits aggregating $26,260.16 and drew 308 checks aggregating $26,260.16, and that within the period of twelve months immediately preceding the filing of the petition in bankruptcy he made 34 deposits in the account aggregating $16,910.77 and issued 183 checks against the account aggregating $17,341.30.

The bankrupt testified that the reason that he maintained this account in the name of Ward was that he was continually "harassed by sheriff's orders"; that he had been so harassed since 1930; that he used the Ward account as a banking account (Tr. 193); that his bank account had been attached prior to 1930 and that was the reason he carried the account thereafter in the name of

Ward (Tr. 194). Ward testified that Strotz told him "there was a possibility of certain moneys of his being attached and he asked me if I would object to having that account and I said no" (Tr. 194).

In 1939, a suit was filed against Strotz by one of the creditors (whose claim was subsequently allowed in the bankruptcy proceedings) in the Superior Court of Los Angeles County. Upon application made by this creditor on August 21, 1940, that Court issued an injunction pendente lite restraining the bankrupt from transferring his property, and a rule to show cause issued returnable August 30, 1940 (Tr. 204, 205). The bankrupt in response to the rule filed an affidavit wherein he stated that he had no account at the Security-First National Bank of Los Angeles at the time of the service of the order to show cause (Tr. 204, 205). On August 21, 1940, the date the restraining order was issued, the bankrupt had on deposit at the bank in the Ward account $558.94. The account remained active until August 30, 1940, the date of the return of the rule, and between August 21, 1940, and August 30, 1940, he made deposits in the amount of $2793.06 and withdrawals in the amount of $3052.00 (Tr. 203).

During the hearing Referee Utley stated that the testimony impressed him that Strotz used the Ward bank account "for the purpose of keeping funds away from Mr. Strotz's creditors" (Tr. 212); that "Strotz wanted to do something to prevent creditors from reaching his money" (Tr. 213); that Strotz testified "in substance that he put this money where it could not be attached" (Tr. 213); that "any other construction of his testimony in that regard would certainly be a very, very strange construction" (Tr. 214).

Concealment of $11,500 Inherited from Estate of Anne Gould Strotz, Deceased.

Anne Gould Strotz, second wife of the bankrupt, died September 13, 1938. The bankrupt was appointed executor of her estate by the Probate Court of Los Angeles County (Tr. 206). The bankrupt was a residuary legatee. From the latter part of 1939 until March, 1940, he received approximately $18,000 from the estate (Tr. 206). No inventory or appraisement was filed until March 12, 1940. The inventory and appraisement that was filed originally bore date of March 12, 1938. The year of 1938 was stricken and 1940 written in (Tr. 208).

In February, 1940, Strotz issued a check on the estate account payable to himself individually for $11,500 (Tr. 209-210). He testified he "drew it out because I will admit I was afraid my bank account might be attached in some form or other" (Tr. 210). In exchange for the $11,500 check he secured cashier's checks dated February 26, 1940, as follows: Check No. 777,205 for $3,600 payable to Harold C. Strotz. Check No. 777,207 for $1,500 payable to Harold C. Strotz. Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt, for $3,000. Check No. 777,201 payable to Bekins Van & Storage Company for $600. Check No. 777,202 payable to Guy M. Peters for $500. Check No. 777,203 payable to Hamilton Vose, Junior for $500. These checks total $9,700. He did not remember whether he received the balance of $11,500 in cash. Check No. 777,205 for $3,600 was cashed by him March 1, 1940. With respect to the check issued to his brother, Sidney M. Strotz, for $3,000, he received in exchange the personal check of his brother for $3,000 which he deposited in the Ward bank account (Tr. 211). Referee Utley, at the time this testimony was received, stated, "If Mr. Strotz had had the protection of his creditors in mind

he would have had some of the $11,500 he got from his wife's estate to have gone toward the payment of some of them" (Tr. 213).

Failure to Keep Books and Destruction of Records.

The bankrupt testified he had no books and records; that each month he destroyed the canceled checks of the bank account at the Security-First National Bank which he carried in the name of Ward (Tr. 192).

On August 7, 1942, Referee Utley issued his memorandum of decision (Tr. 75-83) upon the objections to the discharge and amended plan of arrangement offered by the bankrupt. The Referee in this opinion stated that with the exception of the RFC all the other creditors had recommended the plan; that the RFC had co-signers on the obligation against the bankrupt, one being the estate of John T. Cunningham, deceased, which is financially responsible and will be compelled to pay the claim of the RFC in full whether it receives a dividend from this bankrupt estate or not (Tr. 81). (This statement was entirey unsupported by the record.) The Referee concluded that the RFC would not be damaged in any way by the approval of the plan (Tr. 82); that if the discharge of the bankrupt was denied it would penalize creditors far more than it would the bankrupt; that the evidence did not "establish a clear and convincing case of fraud and concealment of assets as contemplated by Section 14-c of the Bankruptcy Act," and concluded that the objections to the bankrupt's discharge be overruled and discharge granted to the bankrupt (Tr. 82). The Referee also overruled the objections of the RFC to the claim of Eugenia Vollintine, the first wife of the bankrupt, based on the ground that it was barred by the statute of

limitations, the Referee holding that the Illinois statute of limitations of ten years was applicable and not the California four-year statute (Tr. 83). He thereupon directed that the objections to the plan of arrangement be overruled and same be confirmed (Tr. 83).

The formal order and findings of the Referee were not entered until December 2, 1942 (Tr. 116-128). The Referee in this order found that the estate of John T. Cunningham, the co-obligor with the bankrupt upon the obligaton of the RFC, was insolvent; that the Cunningham estate was contesting the claim of the RFC against it in the Illinois courts and disclaimed liability thereon (Tr. 125-126).

On December 2, 1942, the same day on which the order of denial of discharge and approval of plan was entered by Referee Utley, he sent a letter to counsel for the RFC from which it appears that his attention was directed to the decision of this Court in the case of *Averill* v. *Quittner,* 131 Fed. (2d) 312, holding that the bankrupt has the burden of proving that he has not concealed his property upon the production of evidence to the contrary by objecting creditors. In this letter Referee Utley stated:

> "From a strictly technical point of view, upon the cold question of whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered, I think your contention would be correct. However, I cannot bring myself to the point, under the facts in this case, of saying that the bankrupt is not entitled to a discharge when it would mean, in effect, that I would literally pitch into the fire $32,000.00, which all creditors except the Reconstruction Finance Corporation, have expressed a desire to have and which they would not get if his discharge were denied. I feel that such an order would be of greater punishment to the creditors than to the bankrupt and would be a far greater detriment to them. Possibly this position forces me to require stricter

proof upon the question of discharge in so far as the objector is concerned, than I would otherwise require but if creditors are to be denied the right to the funds in question, under the circumstances of the case, I much prefer that a higher court makes such an order." (Tr. 216-217.)

The RFC filed its petition to review the orders entered December 2, 1942, by Referee Utley granting the bankrupt's discharge, approving the plan of arrangement, and allowing the Vollintine claim (Tr. 130-162). The matter came on to be heard before the Honorable Paul J. McCormick, United States District Judge, who held that the Referee erred in holding that the ten-year statute of Illinois was applicable to the Vollintine claim and re-referred the matter to Referee Utley for further hearing. The District Judge in this order did not pass upon the question of discharge or approval of the plan (Tr. 163-169). The matter then came on for further hearing before Referee Laugharn in the absence of Referee Utley. Upon this hearing the bankrupt testified that he had been absent from the State of California during various periods and actually resided in the State of California for a total of less than four years. Referee Laugharn upon this evidence recommended the allowance of the claim of Eugenia Vollintine. The matter then again came on for hearing before the Honorable Paul J. McCormick, District Judge, who on June 28, 1944, entered an order allowing the Vollintine claim, denying the bankrupt's discharge, and disapproving the plan (Tr. 245-248). This is the order involved in the present appeal.

Appellant did not bring the entire transcript of evidence to this Court upon the present appeal but merely included pertinent portions of the transcript submitted by each side to the District Judge (Tr. 192-217, Tr. 234-244). A stipulation was entered into that these portions of the transcript "be relied upon in this appeal as the pertinent testimony"

(Tr. 256). However, at page 4 of appellant's brief a statement is made (unsupported by the transcript) to the effect that Judge McCormick announced that he "would not have sufficient time to read the entire reporter's transcript of the evidence in the proceedings and requested that each side submit the portions of the reporter's transcript which he or it believed would be in support of the briefs filed." We deem this statement misleading and unfair to Judge McCormick. This matter was before Judge McCormick twice upon the petition of the RFC to review Referee's order of December 2, 1942. In his first opinion rendered prior to the submission of the memoranda in question, Judge McCormick said he examined "the voluminous record before" him (Tr. 169). In his second opinion he stated, "The record before us is voluminous, both as to evidential matter and legal memoranda. We have considered it with care" (Tr. 245). We are content to rest our case upon the portons of the evdence as shown by the printed transcript. However, in view of the contention made by appellant that Referee Utley was in a better position to determine the facts, we wish to call attention to the fact that Judge McCormick had before him and considered all of the evidence heard by the Referee.

ARGUMENT.

The instant case revolves solely upon a factual question. The only testimony in the case is that of the bankrupt himself and of F. J. Ward examined by the Trustee in Bankruptcy, and on this testimony we rest our case completely. The only documentary evidence consists of a statement of the bank account maintained by the bankrupt in the name of Ward at the Security-First National Bank of Los Angeles (Tr. Ex. 2, Tr. 195-203). Upon this evidence, oral and documentary, we base our contention that the bankrupt concealed assets, to-wit, the bank account maintained in the name of F. J. Ward and his interest in the estate of his deceased wife, Anne Gould Strotz, by withholding the filing of an inventory in the estate until after he had withdrawn, as residuary legatee, the funds of the estate, and that the District Judge did not err in denying the bankrupt's discharge and disapproving the plan of arrangement submitted by him.

I.

The Ward Bank Account.

The facts concerning the bank account maintained by the bankrupt in the name of Ward are fully set forth in our statement of facts. At page 10 of appellant's brief it is contended that the bank account was not used as a secret depository because the bankrupt "wrote hundreds of checks which were issued by him to merchants throughout the entire county of Los Angeles and elsewhere."

The facts in this respect are almost identical with those in the case of *In Re Manasses,* 125 Fed. (2d) 647 (C. C. A.

7th Cir.) In that case the bankrupt maintained a bank account in the name of his wife. It appears from the opinion that he had a power of attorney from his wife identical with that of the bankrupt in this case (Tr. 195) under which he had the right to sign checks and deposit and withdraw funds, and over a period of three years signed checks in connection with the operation of his business upon this bank account. The Court in that case denied the bankrupt's discharge and held that the account "was maintained for the purpose of placing the money of the bankrupt beyond the reach of his creditors." In the case at bar, both the bankrupt (Tr. 193, 194) and Ward (Tr. 194) testified that the account was maintained for the purpose of preventing the funds from being attached.

At page 11 of appellant's brief the statement is made:

> "that one of the purposes of the F. J. Ward account was to prevent his 'former wife' (*not a creditor in this proceeding*), from attaching his moneys."

The record does not support this statement that the "former wife" was not a creditor in this proceeding. It appears from page 5 of appellant's brief that from 1936 until the time of her death in September, 1938, bankrupt was married to Anne Gould Strotz, Eugenia Vollintine, whose claim was contested by the RFC, was a former wife of the bankrupt. It appears from the petition for arrangement of the bankrupt that the claim of this former wife in the sum of $168,410.85 "is of long standing and represents moneys due by the terms of a property settlement agreement" (Tr. 39). It was the allowance of this claim that enabled the bankrupt to secure the necessary percentage of claims in order to have his plan approved. Referee Utley, when this contention was presented to him, stated, "from the testimony I have heard is I am impressed with this, that Mr. Strotz was not worried about his wife attaching him one-half as much as he was about someone else attaching" (Tr. 213).

At page 11 of appellant's brief it is contended that the bankrupt maintained the Ward bank account to "better aid him in rehabilitating himself in some form of business without being embarrassed or harassed." There is no evidence in the record to support this statement.

Here is how Harold C. Strotz, the bankrupt, tried to rehabilitate himself as shown by the record.

In a period of less than two years (Dec. 13, 1938, to Aug. 30, 1940) he deposited and withdrew in the Ward bank account (Exhibit 2, Tr. 196-203)		$26,260.16
He withdrew from the estate of his wife (Tr. 206)		18,000.00
Total		$44,260.16
Paid to creditors (Tr. 211):		
Guy M. Peters (his Chicago lawyer)	$500.00	
Bekins Van and Storage Company	600.00	
Hamilton Vose, Jr.	500.00	1,600.00
Unaccounted for		$42,660.16

(Except that $2000 was spent for a pleasure trip to Honolulu, Tr. 210).

The Referee did not find that the bankrupt was trying to rehabilitate himself. Referee Utley did, however, express himself upon this subject during the hearing. He stated:

> "If he did put this money in the bank so he could have paid creditors and had used it for that purpose then there might be something to your argument, but where he carried the bank account and uses it for every other conceivable purpose other than that I think a different inference has to be drawn from it. * * * If there has beein any kind of preferring one creditor over another I have not seen it because I have not seen any evidence where any creditor got

> money, so there is no preferring one creditor over another. They have been all very much in the same class, they have not gotten anything, as far as the testimony is concerned. (Tr. 214) * * * That argument is silly, when he owes two million and when the evidence itself discloses he did not pay one cent to creditors." (Tr. 215)

At page 11 of appellant's brief the further statement appears that the bankrupt at no time "failed to disclose the existence of the F. J. Ward bank account." The record shows that on September 6, 1939, Martin T. O'Brien filed a suit against the bankrupt in the Superior Court of Los Angeles County (Tr. 23). A restraining order was issued against the bankrupt in that proceeding on August 21, 1940, enjoining the conveying or encumbering of property of the bankrupt (Tr. 204-205). That the bankrupt filed an affidavit in that proceeding that he had no account at the Security-First National Bank of Los Angeles (Tr. 205). That from the time the injunction was issued until August 30, 1940, the date the account was closed, withdrawals in the amount of $3052 were made by the bankrupt from the account (Tr. 203).

Judge McCormick properly held that it was established by the admissions of the bankrupt and uncontradicted evidence in the case, the Ward Bank Account was "an obvious instrument of concealment" (Tr. 247).

II.

Concealment of Funds Inherited from Estate of Anne Gould Strotz, Deceased.

The record shows that the bankrupt, as executor of his wife's estate, withheld filing of an inventory for a period of approximately two years (Tr. 206). The bankrupt's only explanation was "I never knew I was supposed to

file one'' (Tr. 209). The inventory was filed in March, 1940 (Tr. 209). Shortly before the inventory was filed, in February, 1940, the bankrupt drew a check payable to his order upon the estate account for $11,500 as part of his distributive share as residuary legatee of the estate (Tr. 209, 210, 211). With respect to this withdrawal the bankrupt testified that he exchanged the $11,500 check for the following cashier's checks dated February 26, 1940:

> ''Check No. 777,205 for $3,600 payable to Harold C. Strotz.
>
> Check No. 777,207 for $1,500.00 payable to Harold C. Strotz.
>
> Check No. 777,204 payable to Sidney M. Strotz, brother of bankrupt, for $3,000.00.
>
> Check No. 777,201 payable to Bekins Van & Storage Company for $600.00.
>
> Check No. 777,202 payable to Guy M. Peters for $500.00.
>
> Check No. 777,203 payable to Hamilton Vose, Junior, for $500.00.
>
> These checks total $9,700.00. I don't remember whether I received the balance of the $11,500.00 in cash. The check No. 777,205 for $3,600.00 was cashed by me March 1, 1940.
>
> With reference to the check made out to my brother, Sidney M. Strotz, for $3,000.00, within a week after the check was issued, I received in return for that check the personal check of my brother for $3,000.00 drawn on the First National Bank of Chicago.'' (Tr. 211)

It is argued by appellant (p. 12) that the distributed moneys from the bankrupt to himself as residuary beneficiary without an order of court ''does not warrant the deduction that he thereby concealed, hindered or delayed his creditors.'' This statement so far as it goes may be correct were it not for the fact that the bankrupt admitted that he withdrew the $11,500 in this manner because ''I will admit I was afraid my bank account might be attached

in some form or other'' (Tr. 210). No better evidence could have been adduced of the intent to conceal his interest in this estate than his own admissions.

III.

Section 14-c (4) of the Bankruptcy Act Does Not Make It a Prerequisite That During the Period of Concealment There Should Be a Judgment Creditor Entitled to Execution in the Jurisdiction in Which the Bankruptcy Proceeding Is Filed.

At page 16 the contention is made that because there was no judgment creditor in the State of California entitled to an execution during the period of one year immediately preceding the filing of the petition in bankruptcy, there could have been no concealment under this provision of the Bankruptcy Act. No authority is cited in support of appellant's contention in this respect, and to so hold would defeat the purpose, spirit and intent of the provisions of Section 14-c (4) of the Bankruptcy Act.

However, the record shows that on September 6, 1939, Martin T. O'Brien, a creditor, filed suit against the Bankrupt in the Superior Court of Los Angeles County. That in said action the plaintiff obtained a restraining order on August 21, 1940, restraining the bankrupt from transferring his property (Tr. 204, 205, 206). That after the issuance of the injunction he withdrew $3052 from the Ward bank account (Tr. 203) and filed an affidavit in the O'Brien suit that he had no account at the Security-First National Bank of Los Angeles (Tr. 205).

IV.

The Evidence Showed That the Proposed Plan of Arrangement Was Not Made in Good Faith or for the Best Interest of Creditors.

At page 17 of appellant's brief the contention is made that there is no evidence in support of the finding of the lower court to the effect that the proposed plan of arrangement is not feasible.

The bankrupt *did not make an offer to his creditors until after objections to his discharge were filed.* He was not in any business, so that this is not a case of a bankrupt trying to reorganize a going business. He first offered $10,000; that was rejected. He then offered $25,000 which was rejected. The present offer, made nineteen months after the filing of the voluntary petition for adjudication, was $32,000. This was a clear case of a bankrupt trying to bargain with his creditors and the Court for the purpose of buying his discharge. Before a plan of arrangement can be approved under the Bankruptcy Act it must appear:

1. That it is for the best interest of creditors.
2. That it is fair, equitable and feasible.
3. That the debtor has not been guilty of any acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt.
4. That the proposal be in good faith.

(Sec. 366 Bankruptcy Act.)

None of these requirements were met.

Upon the question of whether the plan is for the best interest of creditors it is difficult to perceive how the creditors are benefited by the acceptance of a nominal dividend out of the gross sum of $32,000, from which the cost of administration must first be paid. The record discloses that if the bankrupt survives his mother he will

receive outright a third of a million dollars from his father's estate which, in the event of the Court's denying his discharge, would be subject to the claims of creditors. The amount of claims allowed was $729,037.39. The offer of the bankrupt was to pay $32,000 to his trustee. Costs of administration were to be deducted before distribution to creditors. Four per cent of $729,037 is $29,161. This is the maximum dividend the creditors would have received under the plan. The record in this case discloses that the plan is neither fair nor equitable.

The record likewise discloses that the bankrupt, by his own admissions, has committed acts which would bar his discharge. The proposal is not in good faith, as demonstrated by the fact that the first offer was not made until thirty days after the RFC had filed objections to his discharge, and the last offer was not made until more than nineteen months after the filing of the original voluntary petition for adjudication.

V.

When the Findings of a Referee in a Bankruptcy Matter Are Based Wholly Upon an Inference, Drawn from Uncontradicted Facts, and the Reasonableness of the Inference May Be as Fairly Determined by the Court as by the Referee, No Presumption in Favor of the Referee's Finding Exists Which Binds the Independent Judgment of the Court.

At page 18 of appellant's brief it is contended that this Court should not give the same weight to the findings of the District Judge as it does to those of the Referee. In support of this contention appellant relies upon *Wilson* v. *Hall,* 81 F. (2d) 918, and general order in bankruptcy 47, Section 11 U. S. C. A. *Wilson* v. *Hall,* 81 F. (2d) 918, does not support appellant's contention. In that case in con-

struing general order 47 the Court at page 919 said, "Where, as here, the Court rejects the finding of the referee, it is the finding of the Court and not that of the referee which is considered presumptively correct upon appeal."

The leading case upon this subject is *Stewart* v. *Ganey,* 116 F. (2d) 1010 (5th Cir.). That case, like this, involved the question of the bankrupt's discharge on the ground of concealment of assets. The District Court set aside the findings of the Referee. The gist of the court's opinion is that where the District Court's finding was supported by substantial evidence and was not clearly erroneous, its finding rather than that of the referee should be accepted by Circuit Court of Appeals on appeal.

In *Carr* v. *Southern Pac. Co.,* 128 Fed. (2d) 768 (C. C. A. 9th), this Court expressly adopted the views of the C. C. A. (5th Circuit) in *Stewart* v. *Ganey,* 116 F. (2d) 1010, 1012, upon this question.

Appellant argues at page 18 that the District Judge did not have the opportunities that the Referee had to hear the testimony of witnesses and thus determine their credibility, and, further, that "at best there was a conflict of evidence on the question of concealment." Judge McCormick in his decision stated that he, in arriving at his conclusion, "made proper allowance for the discretion and prerogative of the trier of facts in reviewing orders of the Referee" (Tr. 245). There was no conflict of evidence on the question of concealment. The concealment was established by the unqualified admissions of the bankrupt himself (Tr. 193, 194). That there was no question of concealment in the mind of the Referee further appears from the statements of Referee Utley during the course of the hearing as shown by the transcript of record (pp. 212-215).

It further appears that on November 30, 1942, the attorneys for the RFC called the Referee's attention to the

ruling of this Court in *Averill* v. *Quittner,* 131 Fed. (2d) 312, construing section 14-c of the Bankruptcy Act to the effect that where the objecting creditor shows to the satisfaction of the Court that there are reasonable grounds for believing the bankrupt has committed the act charged that then the burden of proving that he has not committed such act is upon the bankrupt (Tr. 216).

On December 2, 1942, concurrently with the decision and final order entered by the Referee, he sent a letter to counsel for the RFC in which he conceded that "upon the cold question of whether or not the bankrupt would be entitled to a discharge independent of the plan of arrangement offered" the contention of the RFC would be correct (Tr. 216-217). He further stated in this letter that he would refuse to "literally pitch into the fire $32,000"; that because of this offer he had required the RFC to establish its objections by "stricter proof" than required by section 14-c of the Bankruptcy Act and the rule laid down by this Court in *Averill* v. *Quittner,* 131 Fed. (2d) 312.

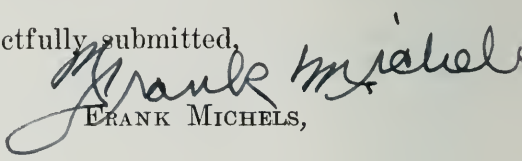
It is obvious from the record that Referee Utley had come to the conclusion from the undisputed facts in the record that the bankrupt had been guilty of an act of concealment sufficient to prevent his discharge in bankruptcy but held against the RFC to penalize it for refusing to accept the bankrupt's plan of arrangement.

Conclusion.

The purpose of a discharge in bankruptcy is to afford relief to honest debtors. The facts in this case, coming from the lips of the bankrupt, conclusively show that he was guilty of concealment of his assets. The bankrupt cannot dispute the facts. Instead he urges an interpretation based upon alleged proper motives which the facts

themselves belie. The order of the District Court sustaining the objections to the bankrupt's discharge and disapproving the plan of arrangement is correct and should be affirmed.

Respectfully submitted,



FRANK MICHELS,

JACOB J. LIEBERMAN,

Attorneys for Reconstruction Finance Corporation, Appellee.